THE RECORD
OF THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

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Association Activities

THE HONORABLE HERBERT F. GOODRICH, Circuit Judge, United States Court of Appeals, Third Circuit, will deliver on May 4 the Ninth Annual Benjamin N. Cardozo Lecture under the auspices of the Committee on Post-Admission Legal Education, Ralph M. Carson, Chairman. Judge Goodrich has selected as his topic "Yielding Place to New." Judge Goodrich has been a member of the Association since 1944, is presently Director of the American Law Institute and is a former Dean of the University of Pennsylvania Law School. There will be a buffet supper preceding Judge Goodrich's lecture.

AT THE ANNUAL MEETING of the Association on May 9 the officers of the Association and members of the Executive Committee, the Committee on Admissions, and the Committee on Audit will be elected.

Sydney G. Soons will present to the Association a bust by Augustus Saint-Gaudens of William M. Evarts, first president of The Association of the Bar.

A report on candidates for judicial office will be presented by

George W. Alger, a member of the Committee on the Judiciary.

Henry Harfield, the chairman of the Committee on Uniform State Laws, will report on the proposed Uniform Commercial Code, and Barent Ten Eyck, chairman of the Special Committee on Improvement of the Divorce Laws, will present a report from his Committee.

Interim reports will be received from the Committee on Post-Admission Legal Education, Ralph Moore Carson, chairman, and the Special Committee on the Federal Courts, Edwin A. Falk, chairman.

ON MARCH 28 the Committee on Real Property Law, Lewis M. Isaacs, Jr., Chairman, held a special meeting to discuss the three rent control bills passed by the Legislature. The Committee adopted a report which was sent to the Governor, reading in part as follows: "While none of the bills adequately defines the services, facilities or privileges to which tenants are entitled, and each fails to cover the situation created by the housing shortage, it is the considered opinion of this Committee that, on balance, the so-called "Stephens Bill," recognizing possible constitutional objections to some of its provisions, is still the least objectionable as a temporary approach to the problem of State rent control legislation."

ARTHUR H. SCHWARTZ, a vice-president of the Association, has been appointed by the Justices of the Appellate Division as a member of the Committee on Character and Fitness in the First Judicial Department.

THE COMMITTEE on Aeronautics, Harper Woodward, Chairman, held a successful forum at the House of the Association on April 18. The subject discussed was Federal Control of Intrastate Air Transport Operations (the Johnson Bill). Professor

Thomas Reed Powell of Harvard acted as moderator; G. Stuart Tipton, General Counsel of the Air Transport Association of America, spoke for the Johnson Bill and John W. Preston, Jr., of the Los Angeles Bar, spoke in opposition.

The Committee has also prepared a report on the question of the limits of liabilities for the death or personal injury of passengers in air carriers as regulated by the Warsaw Convention.

AT THE FIFTH Annual Art Exhibition thirty-six members of the Association exhibited over seventy paintings. The opening was held on April 11 and was a success in every way. The Subcommittee in charge of the exhibit included Wilberforce Sully, Jr., Chairman, Samuel A. Berger, David M. Solinger and René A. Wormser.

Members whose work was displayed were: Reese D. Alsop, Harold J. Baily, Samuel A. Berger, William C. Cannon, Irwin D. Davidson, Mortimer S. Edelstein, Mark Eisner, Freda Fineman, Charles Fredericks, Milton Goldman, Phillip W. Haberman, Leffert Holz, Julius Isaacs, Herbert S. Keller, Joseph Larocque, Ruth Lewinson, Alexander Lindey, Cyrus W. Lunn, Alan D. Marcus, Carl E. Newton, John B. Reubens, Harold Riegelman, Elihu Root, Jr., J. N. Rosenberg, C. J. Shearn, Jr., David M. Solinger, Harris B. Steinberg, Wilberforce Sully, Jr., Samuel W. Tannenbaum, John W. Thompson, Harrison Tweed, Laurence D. Weaver, Emil Weitzner, Joseph C. White, Mortimer B. Wolf and René A. Wormser.

ONLY ONE measure proposed by the Committee on Law Reform, William B. Herlands, Chairman, passed both Houses of the Legislature. This was S. Int. 1587 (A. Int. 2334) relating to the statute of limitations as applied to non-enemies in enemy country or enemy occupied territory. The Governor has not yet approved

the measure. S. Int. 1588 (A. Int. 2007) which would have prohibited judges running for non-judicial office passed the Senate on March 21 but did not get out of the Rules Committee of the Assembly. S. Int. 1632 (A. Int. 2359), a bill to amend the Civil Practice Act in relation to the testimony of husband and wife in divorce actions, died in the Codes Committees of the two Houses. S. Int. 1634 (A. Int. 2161), an act permitting the use of a declaration that a written statement is made under penalties of perjury as an alternative to an oath, passed the Senate on February 27 but did not get out of the Assembly Codes Committee.

ON APRIL 19 the Committee on Law Reform, William B. Herlands, Chairman, had as its guest Judge Jerome Frank and the President of the Association. Judge Frank spoke informally on various questions of law reform.

THE THIRD INTERNATIONAL Congress of Comparative Law will be held this year in Lincoln's Inn and Gray's Inn, London, July 31–August 5, 1950. The Congress had originally been scheduled to meet at The Hague. More than twenty-eight countries have submitted reports and will be represented by delegations. Members of the Bar who desire to participate in the Congress should communicate with Professor Hessel E. Yntema, University of Michigan Law School, Ann Arbor.

THE COMMITTEE on the Surrogates' Courts, Maurice E. McLoughlin, Chairman, with the concurrence of the Committee on State Legislation, John F. Dooling, Jr., Chairman, recommended the approval by the legislature of bills (S. Int. 2186; A. Int. 2845) which would amend the personal property law, the domestic relations law, the decedent estate law and the banking law in relation to the investment powers of fiduciaries. The bill would

disassociate fiduciary investments from those of savings banks and would cover all fiduciaries in Section 21 of the Personal Property Law by defining a fiduciary as including an executor, administrator, trustee, guardian and committee of the property. It would also authorize a fiduciary under the Rule of Prudence to invest 65% of the fund in certain stated investments which would approximate those which are the equivalent of the present legal list and would authorize the fiduciary to invest the remaining 35% of the fund in stocks and bonds not otherwise eligible. The bill passed both Houses and was approved by the Governor.

THE LIBRARY COMMITTEE, Lucius Randolph Mason, Chairman, has announced the appointment of Arthur A. Charpentier as Assistant Librarian of the Association. Mr. Charpentier is a graduate of Boston University School of Law and a member of the Massachusetts bar. During the war Mr. Charpentier served in the United States Army from 1941 to 1946 and holds a commission as Captain. Since 1947 Mr. Charpentier has been Librarian of the Boston University School of Law.

SPECIAL ATTENTION is directed to the bibliography appearing in this number of THE RECORD. The bibliography indicates the considerable work done by the committees of the Association. Many of the reports listed are careful and authoritative discussions of important subjects of current interest.

ON MAY 12 the Association's Committee on International Law, A. A. Berle, Jr., Chairman, and the Committee on Foreign Law, John N. Hazard, Chairman, will act as hosts at the House of the Association for the Midyear Meeting of the Section of International and Comparative Law of the American Bar Association.

The program for the meeting will start at 10:30 A.M. with a meeting of the Comparative Law Division. There will be a buffet luncheon at 12:30 P.M., followed by a forum on the legal basis for peace. A. A. Berle, Jr., will act as moderator and the participants will be Clark Eichelberger, A. J. G. Priest and Elmo Roper. Members of the Association are invited to attend and announcements have been mailed to the entire membership. Further information on the meeting can be secured from Lyman M. Tondel, Jr., vice-chairman of the Section (Rector 2–9740).

"ONE FOR THE BOOK," the Fifth Annual Association Night Show, presented by the Committee on Entertainment, James Garrett Wallace, Chairman, was as the Committee promised, "a fast, furious farrago of farce and fun." The featured actors, "numerous luminaries of bench and bar," were at their best in "tender scenes and graceful dances." There were refreshments and singing after the performance. All present agreed that Judge Wallace capped the climax of his career as the Association's Chairman of the Entertainment Committee. Special thanks are due to Bernard R. Lauren, who composed the music and lyrics for the show and who, also, with the assistance of John F. Devine, produced the book.

AT ITS MARCH MEETING the Committee on Trade Regulation and Trade-Marks, Milton Handler, Chairman, considered a report on proposed amendments to the Trade-Mark Act of 1946. Four points involved in the proposed amendments were given particular study.

The Committee voted to favor a proposed amendment of Section 33 (b) which would delete Sub-Section 7 (anti-trust defense). The Committee also voted in favor of the proposed amendment of Section 14 which would delete a proviso permitting the Federal Trade Commission to apply to cancel registered

marks on certain grounds. The Committee opposed a proposed amendment of Section 14 which would delete a portion of Sub-Section (c) providing for cancellation at any time after the registered mark becomes the common descriptive name of the article or substance on which a patent has expired. The proposed amendment of Section 15 which would delete a proviso stating that no incontestable rights can be acquired in a mark or trade name which is the common descriptive name of any article or substance was also opposed by the Committee. The Committee voted against a proposed amendment of Sub-Section (d) of Section 14 which would provide, in effect, that cancellation proceedings in the case of certification marks may be filed at any time only in the event that the owner does not control or is not able legitimately to exercise control over the use of the mark.

PIANO WANTED

The Association would like to purchase or accept as a loan a grand piano. It would be appreciated if any member who knows of an available piano would call Mr. Sidney B. Hill, General Manager, MUrray Hill 2–0606.

The Calendar of the Association for May

(As of April 26, 1950)

May 1 Meeting of Committee on the Municipal Court of the City of New York
Meeting of Section on Trials and Appeals

May 2 Meeting of Committee on Arbitration
Meeting of House Committee

May 3 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates

May 4 Ninth Annual Benjamin N. Cardozo Lecture. *"Yielding Place to New."* Speaker, The Honorable Herbert F. Goodrich, Circuit Judge, United States Court of Appeals, Third Circuit. *Buffet Supper, 6:15 P.M.*
Meeting of Committee on Trade Regulation and Trade-Marks

May 8 Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Real Property Law
Meeting of Section on State and Federal Procedure

May 9 *Annual Meeting of the Association. Buffet Supper, 6:15 P.M.*
Meeting of Committee on International Law

May 10 Meeting of Section on Drafting of Legal Instruments
Dinner Meeting of Committee on Professional Ethics

May 11 Meeting of Committee on Unlawful Practice of the Law
Dinner of Committee on Criminal Courts, Law and Procedure

May 16 Meeting of Section on Economics of Legal Profession
Dinner Meeting of Committee on Public and Bar Relations

May 17 Meeting of Committee on Admissions
Meeting of Special Committee on Broadcasting
Meeting of Section on Corporations
Dinner Meeting of Committee on Law Reform

May 18 Meeting of Section on Labor Law

May 22 Meeting of Library Committee

May 23 Dinner of Committee on the Surrogates' Courts
Meeting of Section on Trials and Appeals

May 24 Dinner of Section on Wills, Trusts and Estates

English Law and the Nationalised Industries

By The Right Honourable Lord Nathan of Churt, P.C.

I conceive it to be an honour to have been invited to address this distinguished gathering of members of the famous Association of the Bar of the City of New York. I know that you have previously been addressed by Lord Jowitt, the Lord Chancellor of Great Britain and as such, the Head of the Judiciary, and by our Attorney General, Sir Hartley Shawcross, the Head of the English Bar. I believe that I am the first Solicitor to have been thus invited.

The late Parliament in the United Kingdom was elected as the War drew to its close, in July 1945, and ended with the Dissolution in January of the present year.[1]

During these four and a half years the Labour Government, with a majority over all Parties in the House of Commons and notwithstanding its being in a minority in the House of Lords, gave effect to the whole of the legislation programme it had placed before the electorate. Notably by the National Insurance and the National Health Services Acts, substantial progress was made in achieving that part of the programme which aimed at social justice. It laid firm the foundations of the Welfare State.

The other main activity in the domestic field has been eco-

Editor's Note: Lord Nathan was Parliamentary Under-Secretary of State for War and Vice-President of the Army Council, August, 1945 to October, 1946, when he was made Minister of Civil Aviation, from which post he resigned to resume the practice of law in May, 1948. Lord Nathan is a member of the Privy Council, was a member of Parliament from 1929 until created a peer, and is presently serving as chairman of a committee appointed by the Prime Minister to enquire into the law relating to charitable trusts. The lecture which is published here was given by Lord Nathan under the auspices of the Committee on Post-Admission Legal Education, of which Ralph M. Carson is the Chairman.

[1] The following abbreviations are used throughout: B.E. — Bank of England Act 1946; C. — Coal Industry Nationalisation Acts 1946–1949; C.A. — Civil Aviation Act 1946; E. — Electricity Act 1947; G. — Gas Act 1948; I.S. — Iron and Steel Act 1949; T. — Transport Act 1947.

nomic, in the interests of efficiency and the promotion of the public interest, to take into public ownership—or to nationalise, as the phrase goes—certain public services and industries and thus, by making efficiency and the promotion of the public interest their first objectives, to establish the indispensable conditions for industry and commerce, as a whole to function efficiently and to prosper.

This policy has been applied, and in this order, to the Bank of England, Civil Aviation, Coal, Electricity, Inland Transport, Gas, Iron and Steel.

In most of this legislation I had some part. While a Member of the Government, holding an office of Cabinet rank, I had my share of the collective responsibility for the introduction of the Bills. I was a Government spokesman in the House of Lords—more particularly on the Transport Bill. Almost immediately the Act was passed which nationalised Civil Aviation, I was appointed Minister of Civil Aviation, and thus became responsible for its administration. I was of course in close touch with my colleagues concerned with the administration of the other nationalised industries.

With my return to private practice, however, in mid-1948, my responsibilities as a Minister came to an end. Tonight, therefore, I speak to you neither as a politician, nor as an administrator, but just as one lawyer to other lawyers.

Before I come to the substance of what I have to say, let me premise by pointing out that the Services and Industries affected by the Legislation to which I have referred operate, to all intents and purposes, within the domestic field only, and apart from Coal to a limited degree, and possibly Iron and Steel, make no impact on the world outside. The obvious exception is Civil Aviation, which is indeed, as international as an industry well could be. International Civil Aviation is developing, under the auspices of the International Civil Aviation Organisation (I.C.A.O.) sitting at Montreal, what may be called a code of law of its own—and this code is, of course, accepted by the nationalised

Civil Aviation of the United Kingdom in the same way as by the Civil Aviation of the United States and the other countries concerned.

The several Acts which have nationalised a considerable proportion of British public services and industries have a common factor or underlying pattern in the employment of the public corporation as the instrument of public ownership and control.

It is this element of uniformity which alone makes it possible to encompass within the space of less than an hour, a discussion of enactments so varied in their scope as, for example, the Bank of England Act 1946, which brings the Bank into public ownership through the acquisition of the whole of the issued Bank Stock, the Coal Industry Nationalisation Act, 1946, which nationalised collieries and ancillary industries, the Civil Aviation Act, 1946, which set up Airways Corporations under public ownership and the Iron and Steel Act 1949 which invests the public not with the assets of the industry, but with the securities issued by specified companies operating primarily within certain main areas of the industry and which remain in existence to continue their activities in those areas and under their own name.

The public corporation is, of course, no stranger to the American lawyer. The Tennessee Valley Authority is, perhaps, the most striking example of its employment as an instrument of public administration in a capitalist society.

Indeed, I can find no more apt words to describe the objective of the public corporation than those used by President Roosevelt in 1933 recommending to Congress the formation of the T.V.A.:—"Clothed with the power of Government but possessed of the flexibility and initiative of a private enterprise."

It is significant of the value of the public corporation as an instrument of State management that it is to be found not only in the United States and the United Kingdom but also at the opposite (dare I say the Red?) end of the political spectrum. For, in the Communist economy of Soviet Russia, the major industries are run by State Trusts, autonomous legal units hold-

ing their charter from the Supreme Council of National Economy. In the international field, too, such institutions as the International Monetary Fund have been found to be most conveniently constituted as public corporations.

It is obvious that the particular form of these corporations varies not only with the activities which they control but—more fundamentally—with the total character of the legal, social and economic setting in which they are constituted. The constitution of the T.V.A. would be as ill-adapted to the Union of Soviet Socialist Republics as a Soviet State Trust to the United States of America or the United Kingdom. The characteristics, therefore, of the new British public corporations must be considered in the total setting of British constitutional law, and—what is equally important—of British constitutional practice.

De Tocqueville hit upon a great truth—or at any rate upon a great half-truth—when he wrote that the British Constitution does not exist. Certainly, many of the most significant features of our public institutions may be attributed to our lack of a written Constitution. Take, for example, the separation of powers —or more accurately, in our case, the non-separation of powers. For Montesquieu's attribution to the British polity of the separation of powers, inappropriate enough when he write, has been rendered wholly inaccurate by our constitutional developments of the last two hundred years.

The framers of the U.S. Constitution, on the other hand, profoundly influenced by that doctrine, gave it both reality and permanence by enshrining it in your written Constitution.

The separation of powers requires a system of constitutional checks and balances, permanently maintained in equilibrium by a written Constitution, to which all legislation must conform.

Unhampered (or as some of you may think unprotected) by this rigid system, Britain has evolved the principle of Parliamentary supremacy. It has been said that an Act of Parliament can do anything except "make a man a woman or a woman a man" (and even this is an unreal exception, because an Act of Parlia-

ment *could* make a man a woman and a woman a man—"for the purposes of the Act").

Thus, while the legislation of Congress falls to be examined, and from time to time—as happened so often under the New Deal—to be declared unlawful by the Supreme Court, in Britain "the only thing the Court can do with an Act of Parliament is to apply it."

An important consequence of this legislative supremacy is the freedom which it confers on the Government of the day (whatever its political colour) to make new law without anxiety as to its compatibility with the old.

Consider, for example, the fate of the Australian Banking Act, 1947: Section 46 of this Act, which provided for the nationalisation of banking in Australia, was declared invalid by the Privy Council, sitting in London as the Supreme Court of Appeal for Australia, on the ground that it offended against Section 92 of the Australian Constitution, which provides that "trade, commerce and intercourse among the States . . . shall be absolutely free." (*Commonwealth of Australia v. Bank of New South Wales,* 1949, 2 All E.R. 755).

Contrast our own Bank of England Act, 1946, which in bringing the Bank of England under public ownership was quite immune from any such challenge.

Indeed, if there is one principle clearer than another in English law it is the principle that the sovereignty of Parliament is absolute; it is restricted neither by earlier enactments which purport to impose limitations for the future (*Vauxhall Estates v. Liverpool Corporation,* 1932, 1 K.B. 733), nor by an over-riding constitutional instrument.

In theory, therefore, the planners might have made a clean sweep of the social system in Great Britain: they might have conceived a logically coherent scheme bearing little or no resemblance to a capitalist economy.

That they did not do so may be attributed to two distinct reasons:

In the first place, the omnipotence of Parliament is unquestionable as a legal principle: but man does not live by law alone. In fact, parliamentary supremacy is limited in many ways, e.g., by the impossibility of enforcing laws repugnant to the moral sense of the people; by the convention (not always observed, but never ignored with impunity) that a Government is bound to carry out the "mandate" of the electorate; by the necessity of consulting to some extent the major interests affected by legislation.

The second reason—and in my view not the less important—is the essentially empirical, the fundamentally Fabian, character of the British people and their politicians. We prefer to edge forward tentatively from familiar positions; we recognise the "inevitability of gradualness"; we prefer evolution to revolution. Indeed, our ability to dispense with a written Constitution is in itself highly significant; would it be immodest of me to suggest that we do not need to be fenced in, because we are not the sort of people to break bounds?

The Labour Government, then, chose to effect the transfer of some major industries and services from private to public hands through the instrumentality of a familiar legal institution. For the public corporation, in one form or another, has a long history in English law. It can certainly be traced back as far as 1531, when a Statute of Henry VIII appointed Commissioners of Sewers to regulate drainage and water supplies; and under other names, such as Commissioners and Boards, the public corporation has a continuous history since that time as an autonomous organ of administration.

The Port of London Authority and the London Passenger Transport Board, together with the B.B.C., were the immediate predecessors of the new public corporations; they were developments of the statutory Commissioners.

The innovation which has caused acute political dissension, has been the extension of the functions of public corporations from those of regulation and the provision of services to the full-

scale ownership, control and management of undertakings in the field alike of Public Utilities and of industry.

That this development, however, is not due solely to the initiative (or temerity) of a Labour Government is well evidenced by a passage (which I think is worth quoting in full) from a book published eight years before the return of the Labour Government in 1945. In this book, "Public Enterprise", Dr. W. A. Robson—now Professor of Administrative Law at the University of London—wrote as follows:

> "The rise of the public service Board as a new type of concern for operating, organising, or regulating industrial activities, is the most important innovation in political organisation and constitutional practice which has taken place during the past 20 years. These Boards grew up in a typically British fashion. They were not based on any clearly defined principle; they evolved in a haphazard and empirical manner; and until quite recently very few people were aware of their importance or even of their existence. Now suddenly they have become all the rage. Politicians of every creed, when confronted by an industry or a social service which is giving trouble or failing to operate efficiently, almost invariably propose the establishment of an independent Public Board. The idea appeals equally to the Right and to the Left. It may be recalled that the Bill setting up the London Passenger Transport Board was introduced into Parliament by a Labour Minister, continued by his Liberal successor in office, and piloted through its final stages by a Conservative Minister of Transport. In 1931 no less than 320 M.P.'s (including 295 Conservatives) addressed a memorial to the Prime Minister suggesting a transfer of the functions of the Post Office to an organisation of this kind. The Central Electricity Board was set up by a Conservative Government; and the Labour Party holds the view that a similar type

> of institution will be required for the operation of most socialised industries."

Little wonder that Professor Hayek dedicated his well-known libertarian tract "The Road to Serfdom" to "The Socialists of all Parties"!

Certainly, however, the process has been both accelerated and extended by the Labour Party, since its accession to power in 1945.

What is of particular interest is the Labour Government's deliberate choice of the method of indirect control through public corporations rather than direct control through Departments of State. The reason for this choice is not far to seek. As Dr. Robson wrote in 1937:—

> "The complex technological problems involved, the need for a spirit of boldness and enterprise, the desire to escape from the excessive caution and circumspection which day-to-day responsibility to Parliament necessitates, the recognition that the operation of public utilities and industrial undertakings requires a more flexible organisation than that provided by the ordinary Whitehall Department—these were the principal causes which led to the establishment of the independent Public Service Board and helped it to gain public favour."

The choice of the public Corporation gives rise to a number of legal and constitutional problems of interest to the lawyer.

I cannot claim to be able to anticipate every type of question which may arise for the decision of the Courts. My guess is that there will not be many law cases in which a material consideration is the status of public corporations; for it is now commonly accepted—and confirmed by such cases as have come before the Courts—that in its constitutional aspect the public corporation in its relations to the general public differs scarcely at all from the ordinary company.

In general the Nationalising legislation contains the provisions which in the case of an ordinary company are normally found in our Companies Act, the Company's Memorandum and Articles of Association (which I believe you here call the Company's Statutes), a Purchase Agreement, a series of Conveyances to the Company and of agreements for taking over contracts, and a Debenture Issue.

The general pattern of the Acts can be sketched without too much elaboration:—

1. A public corporation such as the National Coal Board, the British Electricity Authority and the Gas Council is constituted to take over the provision of services or the ownership and management of the industry, generally "with perpetual succession and a common seal and power to hold land without licence in mortmain" or it may, like the Transport Commission and the Iron and Steel Corporation, be designated a Public Authority. It will at once be seen that the public corporation has an independent existence of its own, quite separate from the Minister, who is himself established as a corporation sole.

2. Except in the case of the Bank of England, where the members of the Court of Directors are appointed by His Majesty, the members of the Corporation (who constitute what in an ordinary company is the Board of Directors) are, as there are no shareholders, appointed by the Minister. The number of members is laid down in the Act, which also defines in general terms the qualifications they must possess. Some are usually full time, some part-time.

3. As the Corporation has what is virtually a statutory monopoly, the Minister has power after consultation with the Corporation to give directions of a general character on matters appearing to him to affect the national interest. Any such directions have to be published in the Corporation's Annual Report. In order to enable him to perform his functions, the Minister may require the Corporation to furnish him with information regarding its property and activities.

4. The Corporation is required to secure that revenue is not less than sufficient to meet outgoing (including the service of loan capital) properly chargeable to revenue account, taking one year with another.

5. The Corporation is required to create a reserve fund, and any surplus revenue available after providing for the service of loan capital, must be applied to the purposes of the Corporation.

6. Compensation for assets acquired is payable. Apart from Coal where a valuation is made, the compensation is assessed at Stock Exchange values at a choice of stipulated dates in the case of quoted, and by arbitration in default of agreement, in the case of unquoted securities.

7. Finance both for compensation and for working capital is provided by Government Stock or by Loan Stock issued by the Corporation with or without Treasury Guarantee. For the protection of the Treasury certain conditions are imposed on the Corporation:—

(a) The principles of programmes of development involving substantial capital outlay require the approval of the Minister.

(b) The Corporation may not borrow except from or with the consent of the Minister.

(c) The Corporation must redeem stock and repay loans as directed by the Minister with the approval of the Treasury.

(d) The Minister may with the approval of the Treasury give the Corporation directions as to the management and application of its Reserve Fund.

8. To protect the public, advisory Consumers' Councils (under a variety of titles) are appointed by the Minister to hear complaints from consumers: these Councils are also given an initiative of their own apart from complaints. They report to the Minister on complaints and on matters on which independently of complaints they wish to make representations to the Minister. The Minister is not bound to accept their advice, but if he does he may direct the Corporation to give effect to it.

9. The Corporation applies commercial principles of account-

ing and audit. Their audited accounts (which are to conform "to the best commercial standards"), together with an Annual Report must be submitted to the Minister, who in his turn presents them to Parliament. Be it noted that though the Minister performs the administrative act of presenting the Report and accounts to Parliament, they are not his Report and accounts, but the Report and Accounts of the Corporation.

10. The Corporation is liable like any other citizen to any tax, duty, rate, levy or other charge, whether general or local.

11. In most ordinary Companies, profit is, if not the sole, certainly the primary motive. That is not so with the Corporations. Their duty is to provide for the service of outstanding Loan Stock and to pay its way taking one year with another. The objects of an ordinary company are to manufacture and deal in particular commodities—not to do it well, or wisely, or anything else—but simply to do it. The Nationalised Industries all have adjectives or adverbs of quality in their objects clauses: for example: The National Coal Board is to secure the *efficient* development of the Coal Industry, and to make supplies available of qualities and sizes and in quantities and at prices *"best calculated to serve the public interest in all respects."*

The Iron & Steel Corporation is "to promote the *efficient and economical* supply of the products . . . and to secure that these products are available in such quantities and of such types qualities and sizes as may seem to the Corporation *"calculated to satisfy the reasonable demands* of the persons who use those products for manufacturing purposes, and to *further the public interest in all respects."*

Then the Transport Commission is to provide and secure . . . *an efficient adequate and economical and properly integrated system* of inland transport . . . and provide *most efficiently and conveniently* for the need of the public, agriculture, commerce and industry.

It is also part of the statutory duty of the Corporations to promote the welfare, health and safety of those whom they employ.

As the instruments of nationalisation, the public corporations are endowed with certain legal powers (as well as the privilege, which may be mentioned in passing, of a limitation period of three years as against the usual six). Most of the public corporations have the power to acquire land by compulsory purchase: in the case of Civil Aviation it is, by exception, the Minister who is given this power, for though the air lines are owned and managed by the Airways Corporations, aerodromes and their ancillary services are the responsibility of the Minister. The Transport Act, 1947, enables the Transport Commission to acquire the whole or any part of an undertaking either by agreement or by unilateral action, with resort to arbitration. The Iron and Steel Corporation is in effect a Holding Company, in which will be vested the securities of certain specified companies. It has power to acquire by agreement interests in other companies. The corporations which administer nationalised industries take over the rights and obligations of existing contracts but are given transitory power to disclaim agreements, made or varied after the public announcement of the intention to take over and which they consider unreasonable or imprudent.

Arbitration Tribunals composed of both legal and business experts are constituted to settle dispute arising out of the transfer of assets, rights and liabilities from private to public ownership. These Tribunals are Courts of Record with power to administer oaths, summon witnesses and award costs. On questions of law they may state a Special Case for determination by the Court of Appeal, with the possibility of further appeal to the House of Lords, and there is in some cases an appeal to the Court of Appeal on questions of law or fact.

There are no provisions as to the recruitment of personnel to the public corporations and it remains to be seen—it certainly lies outside the province of this Address—whether Britain will develop a commercial public service analogous to the Civil Service. All the Acts, however, have specific provisions concerning conditions of employment, and some of them further contain

specific provisions on Pension Schemes. The Acts put the Boards of the public corporations in the same position as employers or employers' organisations for the purpose of collective bargaining with the appropriate Trade Unions, and the whole machinery which has developed for the organisation of industrial labour, including reference to the Industrial Court applies to the Nationalised industries. The fact, however, that the Boards, as employers, indirectly represent the State, means that they may come to take the lead in the application of any labour and wages policy favoured by the Government of the day: for general directions to that effect would probably be within the powers of direction of the competent Minister. It may be that, in due course, the conditions of employment in industry as a whole will be brought into line with those which obtain in the nationalised industries. This tendency is given concrete expression in the Civil Aviation Act (Section 41) which provides that, except where conditions are regulated by another enactment, by a collective agreement or by the decision of a joint industrial council, any independent undertakings providing similar services to the Airways Corporations shall be compelled to adopt terms and conditions no less favourable for persons engaged in comparable work than are observed by the Airways Corporations.

The public corporations may be divided into two main classes: on the one hand there is the industrial or commercial corporation, such as the National Coal Board, the Airways Corporations, the Transport Commission, the Electricity Authority, the Gas Council and the Iron and Steel Corporation. On the other, there is the social service corporation, such as Hospital Boards under the National Health Services Act. The former type is designed to manage an industry or public utility in the interest of the general public, but in accordance with commercial principles: the latter is designed to carry out a social service on behalf of the Government. The distinction is to some extent obscured by the variations within each group; but it is important. Thus, the commercial corporation is essentially independent in the conduct of its busi-

ness, while the social service corporation is generally subject to closer ministerial control. The commercial corporation's finances do not fall within ministerial estimates, and are not a charge on the Vote, while the social service corporation is financed as part of the Department Estimates and is, therefore, subject to a closer public audit. The social service corporation has indeed been well described as "a prolonged arm of the Executive."

The distinction between the two types of public corporation was noted, by implication, in the recent case of *Tamlin v. Hannaford,* (1949), 2 All E.R. 327. The case is an interesting and significant illustration of how, in the absence of a written Constitution, questions of fundamental constitutional importance fall to be decided as it were *en passant* in the course of private litigation. Here, a dispute between lessee and sub-tenant over two rooms in a small house raised the vital constitutional issue of whether the British Transport Commission, the public corporation set up under the Transport Act, 1947, is a servant or agent of the Crown. This question is no longer as important as it would have been before 1947, when the Crown Proceedings Act swept away the disabilities under which the subject laboured in litigation against the Crown—disabilities which may be traced back to the principle that "the King can do no wrong"—but, as this case shows, it is still a question of some moment, inasmuch as the Crown is not bound by a Statute unless there can be gathered from it an intention that the Crown should be bound; and, again, the question as to whether certain remedies such as mandamus would lie against a corporation would depend on whether it was an agent of the Crown.

In this case, the Plaintiff was the lessee of a house at Plymouth which formerly belonged to the Great Western Railway but became vested in the British Transport Commission under the Transport Act, 1947, and the Defendant was the sub-tenant of some rooms in the house which constituted a separate dwelling within the meaning of the Rent Restriction Acts. The Plaintiff

sued for possession of the rooms, and the Defendant claimed the protection of the Rent Restriction Acts which are designed to protect the tenants of small dwellings from excessive rents and from eviction. The County Court Judge held that the house must be regarded as owned by the Crown and administered by the Transport Commission as agents of the Crown, and, as the Crown was not bound by the Rent Acts, he made an Order for possession. The Court of Appeal reversed this decision; and I venture to quote the greater part of Denning L.J.'s judgment, since it constitutes the most authoritative judicial pronouncement, up to the present, on the nature of a commercial public corporation:

> "The Transport Act, 1947, brings into being the British Transport Commission, which is a statutory corporation of a kind comparatively new to English law. It has many of the qualities which belong to corporations of other kinds to which we have been accustomed. It has, for instance, defined powers which it cannot exceed, and it is directed by a group of men whose duty it is to see that those powers are properly used. It may own property, carry on business, borrow and lend money, just as any other corporation may do, so long as it keeps within the bounds which Parliament has set, but the significant difference in this corporation is that there are no shareholders to subscribe the capital or to have any voice in its affairs. The money which the corporation needs is raised, not by the issue of shares, but by borrowing, and its borrowing is not secured by debentures, but is guaranteed by the Treasury. If it cannot repay, the loss falls on the Consolidated Fund of the United Kingdom, that is to say, on the taxpayer. There are no shareholders to elect the directors or to fix their remuneration. There are no profits to be made or distributed. The duty of the corporation is to make revenue and expenditure balance one another, taking, of course, one year with another, but not to make profits. If it should

make losses and be unable to pay its debts, its property is liable to execution, but it is not liable to be wound up at the suit of any creditor. The taxpayer would, no doubt, be expected to come to its rescue before the creditors stepped in. Indeed, the taxpayer is the universal guarantor of the corporation. But for him it could not have acquired its business at all, nor could it now continue it for a single day. It is his guarantee that has rendered shares, debentures and such like all unnecessary. He is clearly entitled to have his interest protected against extravagance or mismanagement.

"There are other persons who have also a vital interest in its affairs. All those who use the services which it provides—and who does not—and all those whose supplies depend on it—in short, everyone in the land—is concerned in seeing that it is properly run. The protection of the interests of all these—taxpayer, user and beneficiary—is entrusted by Parliament to the Minister of Transport. He is given powers over this corporation which are as great as those possessed by a man who holds all the shares in a private company, subject, however, as such a man is not, to a duty to account to Parliament for his stewardship. It is the Minister who appoints the directors—the members of the Commission—and fixes their remuneration. They must give him any information he wants, and, lest they should not prove amenable to his suggestions as to the policy they should adopt, he is given power to give them directions of a general nature in matters which appear to him to affect the national interest, as to which he is the sole judge, and they are then bound to obey. These are great powers, but still we cannot regard the corporation as being his agent, any more than a company is the agent of the shareholders or even of a sole shareholder. In the eye of the law the corporation is its own master and is answerable as fully as any other person or corporation.

It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government.

"The correctness of these views is shown by the way in which the railways have been dealt with. Apart from the special provisions as to the constitution of the Commission, all that has happened is that there has been an amalgamation of the previous railway companies into one concern which is expressly made subject to the same rights and liabilities as the railway companies were, including statutory duties, contractual obligations, and even some customary obligations. This one amalgamated concern is run by a statutory corporation called the Railway Executive, but this corporation is nothing more nor less than the agent of the Commission. So far as third persons are concerned, the Railway Executive is treated as running the railways on its own account. For instance, the officers and servants of the former companies are treated as officers and servants of the Railway Executive and not of the Commission, but in the last resort it is the Commission which is responsible. If a Judgement against the Railway Executive is not satisfied, execution can be levied against the property of the Commission. All this seems to be quite inconsistent with the notion that the Commission is itself a government department or an agent of the Crown. Execution is not leviable against a government department, even under the Crown Proceedings Act, 1947.

"We do not find it very useful to draw analogies from other bodies which are differently constituted and differently controlled and exist for different purposes. The

Territorial Army Association, for instance, is not concerned with commercial matters, but with the defence of the realm, which is essentially the province of Government, and it is, therefore, to be considered as an agent of the Crown. . . . The Post Office is the nearest analogy. It is, of course, concerned with commercial matters, but it is, nevertheless, a government department and its servants are civil servants. That is, however, an anomaly due to its history. The carriage of mail was a Crown monopoly long before the Postmaster-General was incorporated. But the carriage of passengers and goods is a commercial concern which has never been the monopoly of anyone and we do not think that its unification under State control is any ground for conferring Crown privileges on it.

"The only fact in this case which can be said to make the British Transport Commission a servant or agent of the Crown is the control over it which is exercised by the Minister of Transport, but there is ample authority both in this Court and the House of Lords for saying that such control as he exercises is insufficient for the purpose. . . . When Parliament intends that a new corporation should act on behalf of the Crown, it, as a rule, says so expressly, (as it did in the case of the Central Land Board by the Town and Country Planning Act, 1947, which was passed on the same day as the Transport Act, 1947). In the absence of any such express provision, the proper inference, in the case, at any rate, of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department."

In the light of this judgment we may now consider the legal classification of the public corporations. In the first place, are they departments of Government? It is true that each of the corporations is integrated in the general policy of nationalisation and that the competent Minister has powers of appointment and

direction and is accountable to Parliament for the corporation's policy. But the very purpose of the public corporation was to keep the conduct of nationalised industries out of the hands of Government Departments and any conceivable doubt as to this has been removed by the judgment in *Tamlin v. Hannaford*, which said of the Transport Commission "It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a Government Department, nor do its powers fall within the province of Government." (Ib. at p.329)

Secondly, are the public corporations essentially similar to ordinary commercial corporations? It is true that they are liable for taxes and other dues. Again, they are fully liable in actions, proceedings or prosecutions: nor do they enjoy the one year limitation period of the Public Authorities Protection Act. It is furthermore provided, for example, under Section 6 (3) of the Civil Aviation Act, 1946, that "No provision of this Act conferring any power or imposing any duty upon any of the three corporations authorises the disregard by the corporations of any rule of law, whether having effect by virtue of any exactment or otherwise."

A learned writer (C.E.I.) in the University of Pennsylvania Law Review (Vol. 97 [1949] p. 534) has pointed out the actual term "public authorities" is employed only in the Transport Act, 1947 (though since his article it has been employed in the Iron and Steel Act, 1949) and he arrives at the conclusion that the public corporations should be regarded essentially as commercial bodies. With that conclusion I respectfully agree.

For my part, the attempt to find a legal category into which all the new public corporations may be fitted seems an unprofitable exercise. The recognised broad distinction between the social service corporations on the one hand, and the industrial or commercial corporations on the other, condemns from the outset such a common classification.

The fact that the public corporations do not admit of legal classification is inherent in the empirical, as opposed to con-

ceptual, approach of the English lawyer and legislator. We tend not to worry about classification until we have to. We do not even know for certain whether the Crown ought to be classified as a "corporation sole": and as the question is not likely to arise in the Courts, we probably never shall. It must be admitted that the classification of the public corporations is of greater practical importance. In particular, the Courts may be called upon to decide questions of ultra vires, and their decision in any case may well rest on the view they form of the legal character of the corporation in question.

The ultra vires question is important. For it is mainly its ultra vires jurisdiction which enables the judiciary to protect the subject against encroachments of the executive and public authorities of all kinds, both in their quasi-judicial capacity and in their capacity as legislators by delegation. The importance of this jurisdiction will increase with the extension of public enterprise in the economic and social field. The problem of its application to the new public corporation is complicated by the doubts which were entertained even before their advent as to the extent of judicial powers of supervision over the Administration.

It may be safely assumed that, as corporate bodies, the public corporations are subject to the ultra vires limitation on contractual capacity. It should, however, be observed, first, that their "powers" clauses (like most modern Memoranda of Association or "Statutes" of a commercial company) are drafted very widely, and secondly that the public nature of their operations—their express direction to operate for the public benefit—would militate against a strict construction of their powers.

There is also, of course, the question of tortious liability.

In addition to the ultra vires limitation on contractual capacity and tortious liability to which they may be subject as corporate bodies, the public corporations, as part of the public administration, may also be subject in varying degrees to the supervisory powers which the Courts exercise over administrative authorities. It has been suggested (by Prof. Friedmann) that the main grounds

on which the Courts may invalidate an exercise of administrative powers as ultra vires are (1) excess of power *(exces de pouvoir)* and (2) abuse of power *(detournement de pouvoir)*. It is difficult to conceive of any case under the former heading in view of the absolute discretion which modern legislation has vested in administrative authorities; for in a number of recent cases the Courts have held that this discretion is not subject to an "objective" examination, and that if, for example, the Minister is satisfied that a certain course is desirable in the public interest, the Courts will not consider whether he had "reasonable" grounds for coming to that conclusion. (e.g., *Liversidge v. Anderson,* [1942] A. C. 206; *Robinson v. Minister of Town and Country Planning,* [1947] K.B. 702).

Detournement de pouvoir, on the other hand, is still an effective ground for invalidating an exercise of administrative powers. *(Municipal Council of Sydney v. Campbell* [*1925*]. A.C. 338). An example may be suggested from the Civil Aviation Act 1946. Section 2 (2) provides: "Each of the three corporations shall have power, subject as hereinafter provided, to do anything that is calculated to facilitate the discharge of their functions under the preceding subsection, or of any other functions conferred or imposed on the Corporation by or under this Act, or is incidental or conducive to the discharge of any such function." As we have seen, the Courts will not investigate whether any transaction really is "calculated to facilitate" or is "incidental or conducive to" the discharge of any function: but a purchase of land at an exorbitant price, though not open to challenge as an *exces de pouvoir,* might if shown to be due to the personal interests of a member of the Board be challenged in the Courts as a *detournement de pouvoir.*

Whether it could or not, would depend upon the issue. Are the new public corporations even when not so defined to be classified as public authorities or not? The only safe course would seem to be "wait and see." As each dispute arises, it will be necessary for the Court to consider the corporation concerned as an

individual entity, governed by its own statutory provisions, and subject to its own peculiar legal incidents. No conclusion can be safely drawn from *a priori* conjectures based on a legal classification of the public corporation in general.

This discussion of ultra vires jurisdiction brings me to another topic of importance. How could the question of ultra vires arise in practice? Whereas, in an ordinary company, ultra vires proceedings may be initiated by minority shareholders (Burland v. Earle, 1902 A.C. 83), this has no application to the public corporations which have no shareholders except—in a symbolic sense—the nation at large. Again, if we assume that the public corporations are subject to the same ultra vires jurisdiction as public authorities, how can proceedings be initiated against them? It may be that private business interests will seek injunctions to contest an allegedly undue extension of public enterprise. Where the public interest is concerned, the Attorney-General would be entitled to ask for an injunction. Again, in certain cases, mandamus would lie: though as most of the duties imposed upon the public corporations are public duties, to the performance of which an individual cannot claim a clear right, the scope of this remedy must be regarded as very limited.

The new Public Corporations have been endowed with extensive and elastic powers for the purpose of bringing under State management a considerable proportion of British industry and public utilities. Though it may be asserted as a general proposition that the Public Corporations are as regards legal rights and liabilities in the same position as ordinary companies and are no less amenable to the jurisdiction of the Courts, the ultimate control of the public corporations is not perhaps so much judicial as political, and is effected through ministerial supervision, parliamentary debate and public auditing.

In turning to a brief review of these methods of control, I am perhaps, on the narrowest interpretation, exceeding the bounds of my subject. But Public Law lies on the borderline between the

sciences of law and government, and to confine oneself to the legal aspect is to lose sight of half the subject-matter.

At the outset, a significant contrast may be pointed between the U.S.A. and Great Britain. Here, as a consequence of the separation of powers, the public corporation is directly responsible to Congress: Congress is, in fact, analogous to the Board of Directors, while the directors of the corporation function merely as managers. In Britain, on the other hand, the members of the Boards are directors in the full sense: and while each corporation is ultimately responsible to Parliament, the responsibility is indirect, passing through the competent Minister.

The powers of the Minister are three-fold. First, he controls the membership of the Board. The Bank of England Act. 1946, includes certain limiting devices such as fixed tenure, staggered terms and defined grounds for dismissal: the other Acts do not (though a standard practice may develop by ministerial regulation: e.g., S.R. & O., 1946, No. 1094, regulating appointment to the National Coal Board.) It has been suggested that the Minister's freedom (within wide limits) to appoint and dismiss interferes unduly with the administrative independence for which the public corporations were established. It must be remembered, however, that it would at once expose a Minister to acute public controversy and to Parliamentary Questions and criticism were he capriciously to remove a member of the Board and it would also make it difficult for him to obtain others to fill the appointment. But the indefeasible power of dismissal of a director at any time and irrespective of contract is given to shareholders under our recent Companies Act and there seems no reason why a Minister responsible to Parliament should be less well placed in this respect than the Shareholders of any ordinary company.

Secondly, the Minister may issue directions to the corporation in his charge. The Civil Aviation Act, 1946, provides Section 2 (5): "The Minister may, by an Order relating to any of the

three corporations, limit the powers of the corporation to such extent as he thinks desirable in the public interest by providing that any power of the corporation specified in the Order shall not be exercisable except in accordance with a general or special authority given by him." It is also provided that any such Order must be laid before Parliament, which can annul it within 40 days. This specific form of direction is unusual, and so, too, is its immediate parliamentary control. In the case of Iron and Steel the Minister has power after consulting the Corporation to direct it to discontinue or restrict any of its activities or to dispose of any part of its assets. The usual direction clause is however represented by Section 4 of the Civil Aviation Act which provides, "the Minister may, after consultation with any of the three corporations, give to that corporation directions of a general character as to the exercise and performance by that corporation of their functions in relation to matters appearing to the Minister to affect the national interest; and the corporation concerned shall give effect to any such directions." The Minister's freedom to give directions in relation to matters which appear to him to affect the "national interest" has been criticised as too wide. As Mr. Eden said in the debate on the Coal Industry Nationalisation Act, 1946, (418 H.C. 721), "What does not appear to the Minister to affect the national interest? Almost any conceivable subject concerning the industry could be covered by that." The answer was suggested by Mr. Dalton (ib. 808) ". . . if it were a question of closing one pit, the matter would be within the discretion of the Board. If, on the other hand, it were a matter of closing a large number of pits in the same coal field which might alter the total balance and economic conditions of the area, it would be within the scope of the power . . . to give directions and to intervene in the matter."

The third means of ministerial control is financial. For the Minister's consent is needed for borrowing by the Corporation and he may, with Treasury approval, give directions, as to the

establishment or management of a reserve fund, and as to the application of any excess of revenue over expenditure, (e.g., Civil Aviation Act, 1946, Sections 17, 18), though no part of the Reserve Fund may be applied except for the purposes of the Corporation. The Corporation is also under an obligation to submit to the Minister audited accounts and an Annual Report which he places before Parliament.

The second method of control is through parliamentary debate. In addition to the debate on the Annual Report and Accounts, conduct of the public corporations may be challenged any day at any Question-Time. What sort of question may the Minister be expected to answer? In a debate on this subject on 3rd March, 1948, Mr. Driberg said (448 H.C. 469) "I am merely using the 9.15 from Lincoln as an example. That may have been simply because the 9.15 from Lincoln was so repeatedly unpunctual that it became a matter of wide public concern. Or it may have been because in some way it illustrated a general principle . . . obviously a matter about which a question could rightly be put down on the Order Paper." The answer was suggested by Mr. Morrison on the same occasion (ib. 447). "Has the Minister responsibility; has he done anything or can be do anything about it? If the answer to these questions is No, then a question is not admissible."

I come finally to the vexed question of ministerial responsibility. We have already seen that the relations between the public corporations and the competent Minister are not such as to render the Minister equally responsible for its acts and omissions as he is for the acts and omissions of his own department. Thus, whereas it is a convention of the Constitution that a Minister must bear the responsibility for the faults of his departmental officials and cannot attribute the blame to them, we saw—in the recent debate on the "Groundnuts Scheme"—that this convention has no application to the officers of a public corporation.

The public corporation, as Professor E. C. S. Wade has shown (in Current Legal Problems, 1949) has evolved in its modern

guise from the need for resolving two conflicting considerations:

> (a) the demand for some form of State intervention;
> (b) the resistance to a form of nationalisation which would involve direct administration by the Civil Service."

I believe that it meets that need.

The Corporations are trading concerns, subject to the normal laws of the land. They are not Government Departments, or parts of any Ministry. Nor are they the servants or agents of any Minister. Nor are the Corporations' Employees Civil Servants.

The Minister has no special power to interfere in any way in the day to day working of the Corporation (except as I shall mention in a moment) ; he exercises no closer control over their daily activities that the shareholders are entitled to exercise over the operations of any ordinary company. He maintains over the nationalised industry, or those parts of it which are nationalised, the same powers as held before nationalisation—The Air Safety Regulations for instance apply to the nationalised Civil Aviation to the same degree and in the same way as before nationalisation, and the Minister who was responsible for ensuring their enforcement before nationalisation has the same responsibility after nationalisation. In the case for example of Coal, the Minister of Fuel and Power in the exercise of his regulatory and supervisory powers as the Minister responsible for conditions in the mines has prosecuted officials of the National Coal Board.

Lastly, the Government have no proprietary rights in the property of the Corporations, and the Corporations do not operate "for account of the Government". Apart from payments made from the Corporations' revenue by way of interest on or redemption of compensation Stock issued for the Corporations' assets or advances made to the Corporation the Corporations' revenue can only reach the Exchequer through taxation of its profits, in the same way as the profits of private enterprise.

On the other hand, the Corporation obtains the whole of its

finance through the Treasury, and in consequence the Minister, on behalf of the Treasury, prescribes the terms on which the Corporation must service the capital and he reserves the right to approve major schemes of development. And the corporation is liable to receive from the Minister general directions affecting the national interest as to the exercise of their statutory monopoly.

Outside these two spheres, the Corporation, once appointed, is legally independent and as free to carry on its trading operations without external interference as any company carrying on business in Great Britain, formed in the ordinary way under the Companies Acts.

You may ask: What, then, is the distinguishing characteristic of a Public Corporation? How do Public Utilities and Industries, brought into public ownership through the medium of such Corporations differ from private enterprise operated through an ordinary company?

My reply is that the Public Corporation has been found by experience to be a useful form of organisation, and that it is apt for its purpose. That purpose is that in the publicly-owned Public Utilities and Industries, efficiency and the public interest shall hold the first place.

Whether and how far success will attend the efforts made sincerely and with a strong sense of public responsibility we shall know only as the future develops.

For my part, I have a sober confidence that success will be the outcome. I can at least say that neither thought nor effort are being spared to achieve success.

Committee Report

COMMITTEE ON INTERNATIONAL LAW

REPORT ON RECOGNITION OF NEW GOVERNMENTS

This report centers on the problem of recognition of new governments, since problems of recognition of territory acquired by conquest, or of belligerency, though related, raise questions of the sanctions for unlawful aggression, the law of neutrality, interpretation of treaties, fields of law necessarily beyond the scope of the present report.

JEFFERSONIAN DOCTRINE OF RECOGNITION

The rise of governments with differing political institutions is a recurring phenomenon of international relations, one which continually challenges conceptions of international law formulated on the basis of past experience. American practice in general has followed the tradition established by Jefferson and expressed by Secretary of State Hughes in 1923. ". . . We are not concerned with the question of the legitimacy of a Government as judged by formal European standards. We recognize the right of revolution and we do not attempt to determine the internal concerns of other states. The following words of Thomas Jefferson, in 1793, express a fundamental principle: 'We certainly cannot deny other nations that principle whereon our own government is founded, that every nation has a right to govern itself internally under what forms it pleases and to change these forms at its own will; and externally to transact business with other nations through whatever organ it chooses, whether that be a King, Convention, Assembly, Committee, President or whatever it be. The only thing essential is the will of the nation.' "[1]

Developed at a time when the principle of monarchic legitimacy was prevalent in continental doctrines of recognition, when the notion of maintaining existing governments and states as against all changes in political form received its strongest support abroad, the Jeffersonian doctrine denied the very notion of international validity. In the early nineteenth century, this doctrine received continued confirmation. Answering the protest of the Spanish Minister against recognition of the insurgent Spanish provinces by the United States, Secretary of State John Quincy Adams replied: "In every question relating to the independence of a Nation, two principles are involved, one of

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Editor's Note: This report was prepared for the Committee on International Law by Professor Henry P. deVries, Columbia University School of Law, who is a member of the Committee. No action by the Committee has been taken on Professor deVries' report. It is published here because of its intrinsic interest and also because the Committee hope it will stimulate comments and suggestions.

[1] 1923 For. Rel., Vol. II, pp. 760–761.

right and the other of fact. The former exclusively depending upon the determination of the Nation itself and the latter resulting from the successful execution of that determination . . . This recognition is neither intended to invalidate any right of Spain, nor to affect the employment of any means which she may yet be disposed or enabled to use, with the view of reuniting those provinces with the rest of her Dominions. It is the mere acknowledgment of existing facts."[2]

CONSENT OF THE GOVERNED

Every state tends to develop within itself a legitimist ideal. The United States, founded on the revolutionary idea of sovereignty of the people, successfully executed and expressed in a constitution, has at times departed from Adams' definition of recognition as the "mere acknowledgment of existing facts." Shortly after the Civil War, Secretary of State Seward introduced an echo of the legitimacy principle, forerunner of the "constitutionalism" of Wilson: "The policy of the United States is settled upon the principle that revolutions in republican states ought not to be accepted until the people have adopted them by organic law with the solemnities which would seem sufficient to guarantee their stability and permanency. This is the result of reflection upon national trials of our own."[3] During the administrations of President Wilson and President Coolidge, the test of constitutionality was insisted upon, principally in Central America and Mexico.[4]

From the requirement of Wilson of election by legal and constitutional means as evidence of the consent of the governed, American practice has passed through phases of considering adequate evidence of such consent "unconditional acquiescence in a regime long functioning" (Secretary of State Hughes in the case of Soviet Russia in 1923),[5] "apparent general acquiescence and a promise to hold elections in due course" (Secretary of State Stimson in 1931),[6] to considering it immaterial to recognition that elections actually held were not "free and untrammeled" in the case of the new Yugoslav government in 1945.[7] The recent recognition of the new government in Panama mentions that the new government is "generally accepted by the population."[8] The Acheson statement of September 15, 1949 on recognition of new governments in the Western Hemisphere[9] does not mention popular acceptance of the new government except as it may be implied from the fact of control of the territory.

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[2] Quoted in Goebel, *The Recognition Policy of the United States*, 1915, p. 137.

[3] 1866, Dip. Cor., Vol. II, p. 617.

[4] Hackworth, *Digest of International Law*, Vol. I, p. 259; MacCorkle, *American Policy of Recognition Towards Mexico*, Ch. VI.

[5] Hackworth, *Digest of International Law*, Vol. I, p. 178.

[6] *Ibid.*, p. 185.

[7] 13 Dept. of State Bulletin, p. 1021 (1945).

[8] Dept. of State Bulletin, Dec. 26, 1949.

[9] Dept. of State Press Release No. 700 dated Sept. 15, 1949.

In general, the United States contribution to international law which strongly influenced European practice toward the end of the nineteenth century is the doctrine of recognition of a new government of an independent state without regard to the internal validity of its origin or its international popularity.

WILLINGNESS TO FULFILL INTERNATIONAL OBLIGATIONS

At the end of the nineteenth century, American practice developed the additional requirement of willingness to fulfill international obligations.[10] This test, applied principally to new governments in Central and South America, was intended primarily as a means of securing protection of American governmental and private property in the country concerned. It was a formal reason for refusing recognition of Soviet Russia in 1923,[11] and has appeared continuously in more recent documents evidencing recognition. On the other hand, there are instances in American practice of the position that willingness to fulfill international obligations is not properly part of the issue of recognition of a new government. During the 1912 revolution in China, the United States specifically rejected the request of Japan and Russia that recognition of the new government be withheld until adequate guarantees for safeguarding the common interests of the various interested Powers be secured. The United States agreed "in principle to the policy of concerted action in the recognition of the Republic of China in accordance with the accepted principles of international law," but stated that "the established obligations of China held irrespective of the form of government and passed automatically in turn to the *de facto* Provisional government and to such ultimate government as might merit formal recognition."[12]

When the new Yugoslav government was recognized in 1945, the United States "assumed that, pursuant to international custom, the new Yugoslav government will, as a member of the family of nations and as one which has subscribed to the principles of the United Nations, accept responsibility for Yugoslavia's international obligations, and be disposed to confirm its continued recognition of the existing treaties and agreements between the United States and Yugoslavia."

PURPOSES OF RECOGNITION

As far as consent of the governed is concerned, recent statements of American practice indicate a close parallel to Jefferson's view, that an internal revolution raises no question of international law and that consent of the governed is either presumed from the mere fact of a successful revolution or must yield to the more imperative needs of international intercourse. The

[10] Moore, *Digest of International Law*, Vol. I, pp. 148–151.
[11] Hackworth, *Digest of International Law*, Vol. I, p. 177.
[12] U. S. For. Rel., 1912, p. 76.

test of willingness to fulfill international obligations in view of its history and purpose should not be related to the problem of recognition. In international law, a new government cannot repudiate the proper obligations of its predecessor and an assurance of willingness to fulfill such obligations is subject to all the limitations of economic necessity. More important is the establishment of the formal channel of communication leading to negotiation.

Recognition in international law is the formal acknowledgment of a new situation. One purpose of recognition of new governments is to aid communication among states by identifying the individuals authorized to carry on the numerous aspects of state relationships. When a government rises to power by revolution or civil war, the need for recognition arises mainly because of the uncertainty brought about by the events as to who is the holder of effective power. "But for that circumstance, recognition of governments would occupy only a limited place in international law."[13]

The usual mode of recognition is the establishment of a diplomatic channel through the accrediting and receiving of representatives. Recognition of a government does not, however, depend upon maintenance of diplomatic relations. As in the case of the Franco government in Spain or the recent United States action with respect to Bulgaria, diplomatic intercourse may be impaired or interrupted, but the government continues to be recognized.

Recognition also serves the important purpose of aiding the stability of business transactions. As stated by Mr. Justice Stone: "The very purpose of the recognition by our government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are."[14]

Communication and international stability of transactions are therefore the prime needs which underlie consideration of the doctrine of recognition of new governments by individual states. Bearing these purposes in mind, the sole issue involved in recognition of new governments by individual states should be whether the group which has assumed power in an independent state is to be considered the representative of that state in the international sense. The group must have control of the administrative machinery of the state to be a government,[15] and must have sufficient control to possess the capacity to carry on international relations. Recognition was refused to the Cuban insurgents in 1875, though they were in control of the territory of Cuba, on the ground that "it seems unquestionable that no such civil organization exists which may be recognized as an independent government capable of performing its international obligations and entitled to be treated as one of the powers of the earth."[16]

In addition to actual control therefore, in view of the purposes of rec-

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[13] Lauterpacht, *Recognition in International Law*, p. 156.

[14] *Guaranty Trust Co. of New York* v. *United States*, 304 U. S. 126, 140 (1938).

[15] See statement of Secretary of State Stimson, quoted in Hackworth, *Digest of International Law*, Vol. I, pp. 185–186.

[16] 1875, For. Rel., p. 8.

ognition, capacity to act internationally may require a sufficient degree of stability to warrant establishing formal relations with the new government.

RECOGNITION A FORMALITY

Under modern conditions, recognition of new governments by other individual states should be basically a formality, the act of renewing relations with a foreign state, interrupted by the uncertainties of internal disorder. To view recognition as political in the sense of determination to be made arbitrarily in accordance with narrow conceptions of national interest is not only to attach to it an implication of approval or disapproval, but is a view that may affect adversely our broader national interests. To use non-recognition as a weapon of economic sanction without export and import restrictions and collective action with other states is folly. To view non-recognition as in any sense designed to secure compliance with international obligations can lead only to self-delusion and inaction. To deprive ourselves of the means of invoking some degree of protection for our government and private interests abroad and of the information essential for the formulation of foreign policy in return for self-imposed righteous isolation is to disserve our national interests in effective international relations. Delaying recognition of a new government beyond the period normally necessary to ascertain whether or not it exerts effective control over its territory and whether or not it is likely to retain that control sufficiently to be charged with fulfillment of international obligations is to transform an essential formality necessary for international intercourse and stability of transactions into a symbol of feeble protest.

Issues of self-determination of peoples and compliance with international obligations are now squarely within the jurisdiction of the United Nations. The right of peoples to choose their own form of government, and compliance with international obligations are principles to which all members of the United Nations are committed. Confusing these principles with the function of recognition is to weaken the ultimate possible effectiveness of collective action implementing these principles. An individual state which follows principles of international law in recognition of new governments is still free as a member of the United Nations to unite in the application of collective sanctions in whatever form is deemed appropriate. Enforcement of international obligations, to be effective, must be collective; recognition of the existing facts of international life should be guided by the imperative needs for communication and stability of transactions.

CONCLUSION

The need for maintaining channels of communication among independent states and for stability of international business transactions requires that a state in its relations with others subordinate political expediency to principles of international law tending to promote freedom of communi-

cation and identification of representatives of states. Disputed issues of international unlawfulness are not properly relevant to the issue of recognition but belong within the sphere of responsibility of the United Nations. Consequently a group constituting a government in effective control of the entire territory of an independent state, with capacity to fulfill international obligations should be recognized as the government of that state. All matters relating to willingness to fulfill or due fulfillment of international obligations should be subject to international decision within the framework of the United Nations.

HENRY P. DE VRIES

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"Men are insisting, as perhaps never before, that law shall be made true to its ideal of justice. Let us gather up the driftwood, and leave the waters pure." BENJAMIN N. CARDOZO

"Who is there who can speak with such authority to the American people as the body of the bar, which represents them in the administration of the law of their country? Who is there on whom rests so great a responsibility for the preservation of the fundamental principles of the law, and who is there who, by tradition and teaching and the habits of their life, ought more gladly to accept the duty of making the fundamental groundwork of American liberty a reality among a devoted and patriotic people?" ELIHU ROOT

The following reports, studies and memoranda supplement the original checklist of recent publications printed in the October, 1948 issue of The Record. In addition to giving the members a proper perspective of what is being accomplished by the various committees, this compilation will serve as a guide to what this Association is doing to fit the law for our time.

Committee on Administrative Law. Congressional oversight of administrative agencies. May 18, 1949. 31p., November 8, 1949. 16p.

Committee on Administrative Law. Interim report of subcommittee on relations of the legislative and executive branches with the administrative. March 16, 1949. 9p.

Committee on Administrative Law. Report on the jurisdiction of the Court of Appeals on appeals from non-final orders in proceedings involving administrative agencies. December 13, 1949. 2p.

Committee on Administrative Law. Report on the question of uniform rules of administrative practice and procedure, with specific reference to the McCarran Bill (S. 527, 81st Congress,) May 10, 1949. 13p.

Committee on Aeronautics. Preliminary report of subcommittee on the Warsaw Convention. March 29, 1950. 8p.

Committee on Arbitration. Joint report on use of arbitration under commercial and business rent laws of New York and proposed amendments. March 1, 1949. 4p.

Committee on Arbitration. Report of subcommittee on educational program. October 6, 1949. 5p.

Committee on Arbitration. Report on abuse of arbitration in connection with commercial and business rent laws of the state of New York. February 8, 1949. 11p.

Committee on Bankruptcy and Corporate Reorganizations. Report of meeting of the subcommittee on general bankruptcy matters. September 12, 1949. 7p.

Committee on Bankruptcy and Corporate Reorganizations. Report of subcommittee on Chapter X Reorganizations. November 8, 1949. 9p.

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Committee on the Bill of Rights. Report on congressional investigations. November 22, 1948. 9p.

Committee on Criminal Courts, Law, and Procedure. Bulletins. Nos. 1–2, 1948. Nos. 1–4, 1950.

Executive Committee. Report of subcommittee on revision of Association rules of order. October 1, 1948. 2p.

Committee on Federal Legislation. 81st Congress, 1st Session, 1949. Reports on:

S. 14, to improve the administration of justice and reduce expenditures by eliminating overlapping functions of federal agencies, preserving state and local jurisdiction, utilizing existing judicial remedies, and forbidding unnecessary proceedings. February 23, 1949. 2p.

S. 23, to facilitate the investment of venture capital in new enterprises. February 23, 1949. 2p.

S. 49 and H.R. 2051, to establish uniform qualifications for jurors in the Federal Courts. February 23, 1949. 2p.

S. 50 and H.R. 2050, to provide for a jury commission for each United States District Court, to regulate its compensation, to prescribe its duties, and for other purposes. February 23, 1949. 2p.

S. 440, to amend section 1 of the Federal Power Act to provide that, upon the expiration of his term of office, a commissioner shall continue to serve until his successor is appointed and shall have qualified. February 23, 1949.

H.R. 2168, to amend Title 18 and Title 28 as codified during the last Congress. March 3, 1949. 12p.

H.R. 199 and related bills, to eliminate all barriers as to race in present naturalization laws, simplify the method of computing quotas, and to make certain specific provisions as to quotas chargeable to the governing country of a colony, etc. March 7, 1949. 2p.

H.R. 1915, S. 588, and S.J. Res. 47, to eliminate certain of the present statutory provisions for loss of American citizenship. March 7, 1949. 3p.

H.R. 1951, to amend section 334 (c) of the Nationality Act of 1940. March 7, 1949. 2p.

H.R. 2269 and H.R. 2273, to amend Title 18 of the United States Code (Crimes and Criminal Procedure) to make unlawful the transportation of false and defamatory statements designed to arouse intergroup conflict. March 10, 1949. 7p.

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